



Control Number: 51415



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Addendum StartPage: 0

**SOAH DOCKET NO. 473-21-0538**  
**PUC DOCKET NO. 51415**

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**APPLICATION OF SOUTHWESTERN § BEFORE THE STATE OFFICE**  
**ELECTRIC POWER COMPANY FOR § OF**  
**AUTHORITY TO CHANGE RATES § ADMINISTRATIVE HEARINGS**

**SOAH ORDER NO. 7**  
**GRANTING LEAVE TO FILE SURREPLY; GRANTING OBJECTION AND MOTION**  
**TO STRIKE A SECTION OF SIERRA CLUB'S DIRECT TESTIMONY**

This order grants the Motion to File a Surreply filed by the Sierra Club on April 26, 2021, and grants the Objection and Motion to Strike filed by Southwestern Electric Power Company (SWEPCO) on April 9, 2021.

**I. BACKGROUND**

On March 31, 2021, Devi Glick filed direct testimony and supporting exhibits (redacted) on behalf of the Sierra Club. In Section 5 of her testimony, commencing on page 29 and ending on page 40, Ms. Glick argues that SWEPCO is imprudently investing \$26.8 million to retrofit SWEPCO's Flint Creek coal generating plant to extend the plant life beyond 2028.<sup>1</sup>

On April 9, 2021, SWEPCO filed its Objection and Motion to Strike Section 5 of Ms. Glick's direct testimony (SWEPCO's Motion). SWEPCO emphasizes that its application in this case is based on a historical test year ending on March 31, 2020, and that the capital investment for the Flint Creek retrofit projects that Ms. Glick addresses in Section 5 of her testimony will begin to be placed in service in 2021, which is well after the end of the historical test year. Consequently, SWEPCO argues, the entirety of Section 5 of Ms. Glick's testimony should be struck because it is irrelevant, does not bear on a fact of consequence at issue in this case, and is beyond the scope of this proceeding.

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<sup>1</sup> In the summary of her testimony on page 5, Ms. Glick states that in Section 5, "I review the analysis that SWEPCO conducted to justify retrofitting Flint Creek to comply with the [Coal Combustion Residual] Rule and [Effluent Limitation Guidelines] Rule rather than retire the plant by 2028. I evaluate the prudence of the retrofit decision relative to retirement and replacement."

On April 16, 2021, Sierra Club filed a response to SWEPCO's Motion (Sierra Club's Response). Sierra Club challenges SWEPCO's Motion on a number of points, asserting that:

(1) SWEPCO admits that it "made a decision" to retrofit Flint Creek, and therefore the utility bears the burden of demonstrating that it conducted a "reasoned investigation of all relevant factors and alternatives before reaching its decision."

(2) SWEPCO has decided to retrofit Flint Creek and seeks to recover at least some of the associated capital expenses "for the first time in this case," including \$401,396 in avoidable compliance costs included in the test year of this case.

(3) Ms. Glick's evaluation of SWEPCO's retrofit analysis, including the Company's failure to reasonably evaluate less costly alternatives such as retirement or replacement, is relevant to the prudence of the costs SWEPCO seeks to recover in this case. Ms. Glick's alternatives analysis is also relevant to the prudence of SWEPCO's fixed and variable operations and maintenance test year expenditures necessary to continue operating Flint Creek.

(4) Ms. Glick's testimony is relevant to rebutting the Direct Testimony of SWEPCO witnesses concerning the prudence of the Company's capital and O&M investment planning processes.

(5) Finally, contrary to SWEPCO's suggestion that the Company's decision to retrofit Flint Creek is outside the scope of review in this case, the Commission has broad authority—indeed, an obligation—to consider factual information and analysis necessary to protect ratepayers from imprudent utility investment decisions.

In the alternative, if the Commission accepts SWEPCO's position that some test year spending at Flint Creek is not at issue in this case, then the Commission should take SWEPCO at its word and disallow all requested capital and O&M for Flint Creek that has been included in the test year.<sup>2</sup>

Essentially, Sierra Club argues that because "SWEPCO's decision to retrofit Flint Creek and its continuing investment in the plant is relevant to the rates the Company seeks to recover *in this case*, the Public Utility Commission of Texas (Commission) should deny the motion to

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<sup>2</sup> Sierra Club's Response at 3-4.

strike.”<sup>3</sup> Sierra Club also states:

the fact that the decision to incur retrofit costs and some of the costs occurred *during the test year*, counsels in favor of addressing the full consequences of that decision, including future costs that flow from it. Because the issue must be judged by the information *available at the time of the decision-i.e., approximately February 2020*-there is no conservation of administration resource rationale for delaying adjudication.<sup>4</sup>

On April 23, 2021, in accordance with Order No. 6, SWEPCO filed a Reply to Sierra Club’s Response (SWEPCO’s Reply). SWEPCO makes three major points. First, it asserts that the \$401,396 related to the Flint Creek retrofit recorded in the test year is an entry for Construction Work in Progress (CWIP). SWEPCO states that it has not requested that any CWIP be included in rate base in this proceeding. “None of the capital investment addressed in Section [5] of Ms. Glick’s testimony is contained in SWEPCO’s requested rate base or being reviewed in this proceeding because none of it was placed in service before the end of the Test Year.”<sup>5</sup>

Second, SWEPCO urges that Sierra Club repeatedly and inaccurately states that the Flint Creek Coal Combustion Residual (CCR)/Effluent Limitations Guidelines (ELG) unit disposition study was conducted in February 2020. SWEPCO states that the study was instead conducted in October 2020, and its decision to retrofit the Flint Creek plant for continued operation in compliance with CCR/ELG requirements was made and communicated to the

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<sup>3</sup> Sierra Club’s Response at 10 (emphasis in original). Sierra Club repeats this assertion a number of times in its Response. For example, “In addition to the portion of the Flint Creek retrofit costs SWEPCO actually seeks to recover in this case, . . .” Sierra Club’s Response at 12. SWEPCO’s “preferred approach of seeking approval of some CCR and ELG rule costs in its current test year (as it has requested), . . .” Sierra Club Response at 14.

<sup>4</sup> Sierra Club Response at 18 (emphasis added).

<sup>5</sup> SWEPCO Reply at 4. SWEPCO states that the fact that this \$401,396 is CWIP and not in rate base is confirmed by Rate Filing Package Schedule C-4.1 – CWIP by Functional Group, which is included in SWEPCO’s application and cited in Sierra Club’s Responses in footnote 15. SWEPCO notes that Line 182 of Schedule C-4.1 demonstrates that the same Flint Creek CCR/ELG project identified by Sierra Club on Schedule H-5.3 – FLC U1 DBA CONV (CCR/ELG) was classified as CWIP at the end of the Test Year. Line 182 of Schedule C-4.1 shows that, as of the end of the Test Year, SWEPCO had expended \$1,282,613 on this project and SWEPCO expected to expend a total of \$17,989,452 on this project by the time the project is placed in service on December 31, 2023. The \$1,492,488 in estimated Allowance for Funds Used During Construction (AFUDC) that is identified on line 182 of Schedule C-4.1 and cited in footnote 15 of Sierra Club’s Response is the estimated AFUDC that will have accrued to the project by the time it is placed in service. SWEPCO Reply at 3.

U.S. Environmental Protection Agency in November 2020, which is seven months after the end of the test year.<sup>6</sup> SWEPCO concedes that the timing of the unit disposition study and decision to retrofit are not dispositive of its Motion, but insists that Sierra Club's misstatement of these facts implies a connection to test year-end rate base that does not exist.<sup>7</sup>

Third, SWEPCO argues that Section 5 of Ms. Glick's testimony does not address, in any part, the capital investment being requested for inclusion in rate base or the operation and maintenance (O&M) expenditures incurred during the test year.

On April 26, 2021, Sierra Club filed a Motion for Leave to File a Surreply (Surreply) in opposition to SWEPCO's objection and motion to strike. The Administrative Law Judges (ALJs) hereby **GRANT** Sierra Club's request and have considered its Surreply. Sierra Club insists in its Surreply that SWEPCO's response to Cities Advocating Reasonable Deregulation's Request for Information No. 1-16 establishes (or at least raises a fact dispute) as to whether SWEPCO is purporting to recover the \$401,396 test year amount through rates in this case. Sierra Club, however, does not dispute SWEPCO's assertions that this amount represents CWIP. Sierra Club concludes, "Striking Ms. Glick's testimony would prejudice Sierra Club and impermissibly prevent it from presenting its case challenging the prudence of SWEPCO's decision to retrofit Flint Creek, as well as the Company's continuing capital and operations and maintenance investments in the plant."<sup>8</sup>

## II. ANALYSIS AND ORDER

The Commission's Substantive Rules state that the inclusion of CWIP is an exceptional form of rate relief. "Under ordinary circumstances the rate base shall consist only of those items

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<sup>6</sup> SWEPCO Reply at 4.

<sup>7</sup> *Id.*

<sup>8</sup> Surreply at 4.

which are used and useful in providing service to the public.”<sup>9</sup> The ALJs conclude that the \$401,396 referenced in Section 5 of Ms. Glick’s testimony and her Exhibit DG-3 is classified as CWIP, and had not been moved to SWEPCO’s rate base as a capital item before the end of the test year. As noted, Sierra Club did not argue in its Surreply that this amount is something other than CWIP. Consequently, contrary to Sierra Club’s foundational argument, SWEPCO is not seeking to recover, and will not be allowed to recover, any Flint Creek retrofit costs in this case. As such, Sierra Club’s prudence challenge to the Flint Creek retrofit is not ripe for consideration in this case. Once the Flint Creek retrofit is used and useful in providing service, and if SWEPCO then proposes to recover these retrofit costs through its rates in a future base rate case, Sierra Club and any party can then challenge the prudence of SWEPCO’s decision to retrofit Flint Creek if they so choose.

The ALJs also find that SWEPCO did not make a decision in the test year to retrofit Flint Creek; the decision was made well after the close of the test year. Sierra Club, therefore, is incorrect to the extent it suggests that the timing of the retrofit decision during the test year (which it was not) somehow makes the prudence of the decision relevant to this base rate case.

The ALJs also reject Sierra Club’s alternative proposal that the Commission should disallow all requested test year Flint Creek capital and operations O&M expense. Sierra Club states that this alternative proposal would result in a \$9.8 million disallowance in O&M and a \$3.4 million disallowance in capital expense in this case.<sup>10</sup> Sierra Club has offered no legal support for this alternative proposal, and the hearing on the merits has not yet convened at which Sierra Club could attempt to develop a record that would justify disallowance of some or all of capital and O&M actually incurred by SWEPCO in the test year to maintain Flint Creek.

Finally, granting SWEPCO’s Motion in this docket will not preclude Sierra Club from presenting its case challenging the prudence of SWEPCO’s decision to retrofit Flint Creek.

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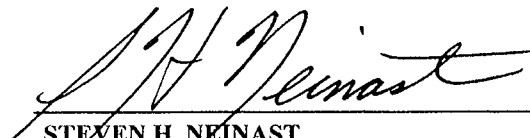
<sup>9</sup> 16 Tex. Admin. Code § 25.231(c)(2)(D). In this case, SWEPCO has not pleaded that exceptional circumstances exist that could potentially justify including CWIP in rate base.

<sup>10</sup> Sierra Club’s Response at 19.

Sierra Club presumably can challenge SWEPCO's retrofit decision in a future case in which that issue is properly before the Commission. But this is not that case.

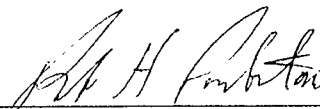
For these reasons, SWEPCO's Motion is **GRANTED**. Section 5 of Ms. Glick's testimony filed on March 31, 2021 is struck and will not be admitted into the record of this proceeding.

**SIGNED April 27, 2021.**



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STEVEN H. NEINAST  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS



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ROBERT H. PEMBERTON  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS